Kewangan Bersatu Bhd v Yap Ah Yit & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 22–285 OF 1996
FAIZA TAMBY CHIK J
15 JUNE 1998

Civil Procedure *— Judgment — Default of defence — Application to set aside — Defendants claimed judgment was irregular — Whether default judgment could only be set aside as of right where procedural steps under Rules of High Court 1980 not complied with*

This was the defendants' application in encl 14 to set aside the judgment-in-default of defence entered against them. The defendants submitted that the judgment is irregular and should be set aside on three grounds, namely: (i) that the plaintiff's claim is time barred; (ii) that the plaintiff — in breach of r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 — has failed to give seven days notice to the defendants' present solicitors when entering the judgment-in-default of defence; and (iii) that the plaintiff has failed to send the draft judgment to the defendants' solicitors for their approval. The plaintiff, on the other hand, submitted that the judgment obtained is regular.

Held, allowing the application:

(1) In this case, the cause of action accrued and the limitation period began to run before 13 March 1987, ie when the defendants failed to make payments for the instalment, as claimed by the plaintiff, and whereby the plaintiff carried on the action with the filing of the first summons. In the circumstances, the present action is time barred (see p 446E–F).

(2) Although r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 does not have the force of law, it is a good practice to adhere to it; the breach of which would attract displeasure and censure from the members of the Bar generally (see p 448D).

(3) So long as a counsel has notice of the fact that there is an opposing counsel on record, there lies a duty under the ethical rule, an obligation for either counsel to forward any draft order whatsoever for the opposing counsel's approval and to give due notice, which in this case the plaintiff's counsel have failed to abide by (see pp 449I–450A).

(4) The judgment in default of defence was entered due to the defendants earlier solicitors' failure to file the defence within the time provided for. The court would not penalize the defendants because of the negligence of their solicitors. Furthermore, the defendants have changed their solicitors immediately upon realizing this fact and this shows that the defendants intend to defend and do in fact have defence in this action (see p 448F, H–I).

A **[Bahasa Malaysia summary**

Ini adalah permohonan defendan-defendan seperti di dalam lampiran 14 untuk mengetepikan penghakiman ingkar pembelaan yang telah diperolehi terhadap mereka. Kedua-dua defendan telah menyatakan bahawa penghakiman tersebut adalah di luar aturan dan hendaklah diketepikan atas tiga dasar, iaitu: (i) bahawa tuntutan plaintif telah luput masa; (ii) bahawa plaintif telah gagal — bertentangan dengan peruntukan k 56 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 — untuk memberi notis tujuh hari kepada peguam-peguam defendan apabila memasuki penghakiman ingkar pembelaan; dan (iii) bahawa plaintif telah gagal menghantar draf penghakiman kepada peguam-peguam defendan bagi mendapat persetujuan mereka. Plaintif sebaliknya menyatakan bahawa penghakiman yang diterima itu adalah mengikut aturan.

Diputuskan, membenarkan permohonan:

(1) Di dalam kes ini, kausa tindakan telah terakru dan tempoh had masa telah bermula dari 13 Mac 1987, iaitu apabila defendan-defendan telah gagal untuk membuat pembayaran bagi bayaran ansuran, seperti yang dituntut oleh plaintif dan di mana plaintif telah melaksanakan tindakan tersebut dengan memfailkan saman yang pertama. Dalam hal keadaan ini, tindakan tersebut telah luput masa (lihat ms 446E–F).

(2) Kaedah 56 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 tidak mempunyai kuasa undang-undang. Walaupun begitu, ia adalah satu amalan yang baik untuk diikuti; pelanggarannya akan menimbulkan rasa tidak senang hati dan kecaman daripada ahli-ahli Majlis Peguam umumnya (lihat ms 448D).

(3) Prinsip asasnya adalah selama mana seseorang peguam itu mempunyai notis terhadap adanya peguam lawannya di atas rekod, terdapat satu kewajipan di bawah kaedah etika, satu tanggungjawab bagi kedua-dua peguam untuk memberi apa-apa draf perintah kepada pihak yang satu lagi untuk persetujuannya dan sebagai memberi notis yang sewajarnya, di mana di dalam kes in peguam plaintif telah gagal untuk mematuhinya (lihat ms 449I–450A).

(4) Penghakiman ingkar pembelaan telah diperolehi disebabkan oleh kegagalan peguam-peguam kedua-dua defendan yang terdahulu untuk memfailkan pembelaan dalam jangka masa yang ditetapkan. Mahkamah tidak akan membenarkan seorang anak guam menderita akibat kecuaian peguamnya. Selanjutnya, di dalam kes ini, mahkamah tidak akan menghukum kedua-dua defendan kerana kecuaian peguam-peguam mereka. Tambahan pula, kedua-dua defendan telah menukar peguam-peguam mereka secepat mungkin apabila menyedari perkara ini dan ini

menunjukkan bahawa kedua-dua defendan berniat untuk membela dan mempunyai pembelaan di dalam kes ini (lihat ms 448F, H–I).]

Notes

For cases on application to set aside judgment in default of defence, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2570–2575.

Cases referred to

Fira Development Sdn Bhd v Goldwin Sdn Bhd [1989] 1 MLJ 40 (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 AMR 846 (refd)
Malaysian National Insurance Sdn Bhd v Tan Kong Ming [1997] 3 CLJ Supp 121 (refd)
McHenry McDermott v Boyd, Re [1894] 3 Ch 290 (refd)
Nadedinco Ltd v Kevin Corp Sdn Bhd [1978] 2 MLJ 59 (refd)
Reeves v Butcher [1891] 2 QB 509 (refd)

Legislation referred to

Legal Profession Act 1976 s 77(3)
Legal Profession (Practice and Etiquette) Rules 1978 r 56
Limitation Act 1953 s 6(1)(a)
Rules of the High Court 1980 O 18 r 19, O 19 rr 2(1), 3, 9, O 42 rr 8(1), 10, 13

Shuhaiza Jasbinder & Lim for the plaintiff.
Arbain Chandra Chew & Associates for the first and second defendants.

Faiza Tamby Chik J: This is the first and second defendants' application in encl 14 to set aside the judgment-in-default of defence entered against them on 2 July 1997.

The plaintiff entered judgment-in-default of defence against the first and second defendants on 2 July 1997. The plaintiff submitted that the judgment obtained is regular. However, the first and second defendants submitted that the judgment is irregular. It should be set aside as of right on the following grounds:

(i) that the plaintiff's claim is time barred;

(ii) that the plaintiff has failed to provide the 48 hours notice to the defendants' solicitors when entering the judgment-in-default of defence; and

(iii) that the plaintiff has failed to send the draft judgment to the defendants' solicitors for their approval.

The default judgment could only be set aside as of right where the procedural steps laid down under the Rules of the High Court 1980 have not been complied with. In *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40, Lee Hun Hoe CJ (Borneo) at p 41 said:

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heared on the merits.

And the plaintiff submitted that the only procedures in issue are:

(i) that of the 48 hours notice; and

(ii) that the draft judgment was not forwarded to the defendants' solicitors for their approval.

It is obvious that the plaintiff had begun a number of actions against the defendants based on the same cause of action with the present suit whereby the said judgment-in-default of defence was obtained, ie based on the defendants' failure to abide to the loan agreement dated 4 October 1984 (see exh YAY–2 encl 14). The plaintiff earliest action was filed on 13 March 1987, vide Summons No 62–1467–87 in the Kuala Lumpur Sessions Court. The defendants submitted that the cause of action accrued and the limitation period began to run when the defendants failed to abide by the first letter of demand that was sent then, and not subsequent letters sent at any other later time. Even though in this present case it is not clear when the first letter of demand was sent, as both earlier summons in exh 'YAY–2', in particular para 11, did not explain the date when the letter of demand was sent to the defendants, the cause of action must have accrued much earlier before the 13 March 1987, that is when the defendants failed to abide by the first letter of demand sent.

The defendants' first issue is that this present action was filed on 31 June 1996, and based on that fact, the cause of action accrued before 13 March 1987, consequently, it is obvious that this present action has been filed almost nine years after the cause of action accrued. Section 6(1)(a) of the Limitation Act 1953, inter alia, provides that:

> (1) ... actions shall not be brought after the expiration of six years from the date on which the cause of action accrued that is to say —
>
> (a) actions founded on a contract ...

In the case of *Malaysia National Insurance Sdn Bhd v Tan Kong Ming* [1997] 3 CLJ Supp 121 at p 131, in deciding on the issue of limitation, reference was made to the case of *Nadefinco Ltd v Kevin Corp Sdn Bhd* [1978] 2 MLJ 59, whereby the Federal Court in the later case held that:

> ... the cause of action accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, the action being commenced more than six years after the cause of action arose.

Suffian LJ in deciding that case, referred to the decision of Lindley LJ in *Reeves v Butcher* [1891] 2 QB 509 at p 511:

> The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

Suffian LP continued at p 61:

> Three years later, a similar problem arose in the Court of Appeal in *Re McHenry McDermott v Boyd* [1894] 3 Ch 290. There a man borrowed money. First he undertook to pay the lender in February 1883. Secondly, he deposited securities which the lender was authorized to sell if the loan was not paid, and undertook to pay the difference if the proceeds of the sale were not enough to pay the debt. The borrower paid one amount in February 1884, and nothing thereafter. In 1889, the lender sold the securities. The proceeds were not enough to pay the debt. So he sued to recover the difference. The court held that he was barred by the statute of limitation. It was argued on behalf of the lender that time began to run against the lender only from 1889, when the securities were sold and the actual amount payable by the borrower was ascertained; that the contract between the two was severable; that it was its second part that gave rise to the claim, namely for the difference between the proceeds of sale and the original advance, and that that difference, and consequently the cause of action, was not ascertainable until 1889. Lord Herschell LC rejected this argument saying at p 293:
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> > 'I cannot say that that right of realization gave a new, separate and independent cause of action, so that the statute did not begin to run until from that date. The truth is that the debt is one debt only.'
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> Lindley LJ was also a member of the court then, and he said at p 295:
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> > 'The realization of the security does not add to the cause of action; the cause of action accrued long before.'

Therefore, it is obvious in this case that the cause of action accrued and limitation period started to run before 13 March 1987, ie when the defendants failed to make payments for the instalment, as claimed by the plaintiff and whereby the plaintiff carried on the action with the filing of the first summons. In the circumstances, the present action is time barred. The issue that the plaintiff had sold off the property charged to them in 1992 and are now claiming for the balance outstanding, does not mean that a new cause of action has accrued or that the limitation period has stopped running or a continuing cause of action arose.

In *Malaysian National Insurance Sdn Bhd v Tan Kong Min*, the court stated at p 132: 'In line with the thinking of Lindley LJ in *Re McHenry*, I hold that the promise to pay the deficiency (after conclusion of auction sale and realization of proceeds) does not create a new obligation to pay; it only applies to the old obligation, but to a reduced sum. The realization of the security being the charged property, does not add to the cause of action, the cause of action having already accrued on 26 September 1986.'

Further, exh 'YAY–1' para 13 in encl 14 does not merit the accrual of a new cause of action. The said letter, dated 20 March 1988, does not in any way refer to the present debt and the defendants did not make any admission or acknowledgement regarding the present debt. Thus, the said letter does not create a fresh accrual of the cause of action. In any event, it

A is the defendants' submission that the said letter is invalid, as the same is time bared. The plaintiff have failed to prove that the defendants have agreed to pay any balance which would occur due to the sale of the said property. Therefore, due to the plaintiff's delay in commencing an action against the defendants, the plaintiff is now estopped and barred from commencing any action against the defendants based on the said cause of B action. This delay has indirectly led to the plaintiff waiving their rights to claim against the defendants. In *Malaysia National Insurance Sdn Bhd v Tan Kong Min,* at p 122, it was held that:

> The conduct of the plaintiff in delaying the enforcement of its right clearly calls for the application of the equitable doctrine of laches. The maxim C *vigilantibus et non dormientibu lex succurrit* ought to apply. It is unjust to give the plaintiff a remedy where it has by its conduct done that which might fairly be regarded as equivalent to a waiver of it.

It is the defendants' submission that the said judgment-in-default of defence is irregular and therefore, invalid and not binding on the defendants D and ought to be set aside as of right as the plaintiff's claim has been time barred and it is the defendants' submission that this is also a valid statutory defence.

In the case of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 AMR 846, the Court of Appeal said at p 852:

E > The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 AMR 215. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ said (at p 225):
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> > 'The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the F defendant is entitled to have it set aside ex debito justicia, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made:
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> > (a) with reasonable promptitude, in other words within a reasonable time; and
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> > (b) before the defendant has taken any fresh step after becoming aware G of the irregularity (see O 2 r 2(i) of the Rules of High Court 1980).'

In his case, O 42 r 13 of the Rules of the High Court 1980 ('the RHC') has been followed, whereby it requires that:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or H judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

It is observed that the said judgment-in-default of defence has been served on the second defendant and the defendants' present solicitors on 6 August I 1997, and the summons-in-chambers to set aside the said judgment-in-default of defence was filed and served on the plaintiff's solicitors on 18 August 1997, within the time provided.

The defendants' second issue is that whilst the existence of exh 'SMS–1' is not denied, the fact disputed is that the said notice was given to the defendants' earlier solicitors and that the defendants' present solicitors, M/s Arbain Chandra Chew & Associates, was not given any notice of the plaintiff's solicitors intention to enter a judgment-by-default of defence against the defendants. Therefore, it is the defendants' submission that the plaintiff's solicitors had failed to give the seven days notice to the present solicitors or to the defendants and therefore, breaching r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. Rule 56 reads:

> Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleading or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-name advocate and solicitor.

I am of the view that r 56 does not have the force of law, nevertheless it is a good professional practice to adhere to it; the breach of which would attract displeasure and censure from the members of the Bar generally. It must be borne in mind that the making of the rules for regulating the professional practice and etiquette is provided under Part VI of the Legal Profession Act 1976 ('the LPA'), which is an act to consolidate the law relating to the legal profession in Malaysia. Under s 77(3) of the LPA, it is provided that any advocate and solicitor who fails to comply with any rules made under this section (ie Part VI), may be liable to disciplinary proceedings. It is a fact that any advocate and solicitor who has been disciplined under the rules does not speak volumes or well for himself in his practice.

Further, it is obvious that the said judgment-in-default of defence was entered due to the defendants earlier solicitors' failure to file the defence within the time provided for. In the case of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 AMR 846, the Court of Appeal held that (at p 847):

> The explanation of the appellant that the delay was caused by his solicitor was not a reasonable explanation. Although a court will not allow a client to suffer for the negligence of his solicitor, there are limits to what may be done in the interests of justice. The facts and circumstances indicate that the appellant did not communicate with his solicitor earlier to discover the state of the case against him. This indifference should not adversely affect the plaintiff. Furthermore, the plaintiff's solicitors had granted the appellant's solicitors every indulgence in relation to the delivery of pleadings (see p 852).

Therefore, the court will not allow a client to suffer for the negligence of his solicitor. And in this case, the court will not penalize the defendants because of the negligence of their solicitors. Furthermore, the defendants have changed their solicitors immediately upon realizing this fact and this shows that the defendants intend to defend and do in fact, have defence in this

action. The summons-in-chambers to strike out the plaintiff's claim under O 18 r 19 of the RHC and the notice of change of solicitor were filed on 2 July 1997, and served on the plaintiff's solicitors on the same day; the day the said judgment-in-default of defence was entered.

The third issue refers to para 9 of the plaintiff's statement of claim, dated 31 July 1996, whereby the plaintiff failed to take into account the sum of the sale price of the said property which was sold at RM70,000 and therefore, the sum claimed by the plaintiff is in fact in excess of the actual amount owed. Hence, the said judgment-in-default is irregular. Paragraph 9 of the statement of claim states the sum of RM149,229.34 as 'bayaran ansuran', which means payment of instalments. This does not in any way indicate or prove any sum of the sale price, as claimed by the plaintiff.

The fourth issue is that the plaintiff's solicitors have failed to abide by O 42 r 8(1) of the RHC, which provided that:

> Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party ... .

It is submitted that the plaintiff's solicitor have, in fact, knowledge that there were solicitors on record on behalf of the defendants and yet, they failed to abide by the said rule and sent a draft copy to them. Under O 19 r 2(1), the judgment obtained is a final judgment with an absolute and ascertained sum. However, under O 19 r 3, the judgment obtained is only an interlocutory judgment with damages yet to be assessed at a later date. As such, there is a difference in obtaining a judgment under the two said orders. A defendant who has been subjected to a judgment under O 19 r 3 may still be able to defend himself during the hearing of assessment of damages in regard to the quantum payable. This opportunity is not open for a defendant who has been subjected to a judgment obtained under O 19 r 2(1). Thus, the reason why a draft judgment is not as necessary in an O 19 r 3 judgment compared to an O 19 r 2(1) judgment as provided for under the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, which is relied on by the plaintiff.

For the reasons stated above, it is not therefore proper for the plaintiff's counsel to suggest that O 19 r 3 is in pari materia with O 19 r 2(1). Further, a judgment under O 19 r 2(1), as in the present case, has been obtained without hearing the merits of the case and the plaintiff's counsel, having notice, in particular, of defendants' counsel on record, has a duty vide O 42 r 8(1) to forward a draft judgment for approval before proceeding in the preparation and filing the sealed judgment pursuant to O 42 r 10. Thus, the plaintiff's counsel's submission that O 42 r 8(1) is not applicable to them in this case is misconceived. There is a statutory obligation on the part of the solicitors for the plaintiff to file a draft judgment under O 42 r 8.

It is my view that the basic principle is that as long as a counsel has notice of the fact that there is an opposing counsel on record, there lies a

duty under the ethical rule an obligation for either counsel to forward any draft order whatsoever for the opposing counsel's approval and to give due notice, which in this case, the plaintiff's counsel have failed to abide by.

Lastly, the fifth issue is that the said judgment-in-default of defence had been entered as a result of the defendants' failure to comply with a procedural step ie to file in a defence within the time provided. And the court has an absolute discretion to set aside such a judgment.

In *Fira Development Sdn Bhd v Goldwin Sdn Bhd*, the Supreme Court held that (at p 41):

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits.

And moreover, O 19 r 9 of the RHC provides that:

> The court may, on such terms as it thinks just, set aside ... any judgment entered in pursuant to this Order.

Under the circumstances, I see no ground why I should not decide in favour of the defendants. I therefore make an order in terms of encl 14.

Application allowed.

Reported by Mohd Rizal Abidin